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Assembly Bill 177

Mr. Chairman and members of the committee, thank you for the opportunity to testify as the author of AB177.

When I made the decision to run for the state assembly, one of my main goals was to make our state government and its agencies more accountable to the people of Wisconsin. In my professional life, and in my service to the community as a local elected official, I have been impressed by the level of professionalism in government agencies. Their obvious dedication to their work and their desire to see the rules applied to everyone equally is commendable.

In the case of the Department of Natural Resources, their commitment to protecting the environment is not only exemplary, but is also a long standing tradition in our great state. If there has been a consistent criticism of the DNR and state agencies in general, it has been that they are not always models of efficiency. They do not always take into account the ramifications of their decision making process. This is especially true in the permitting process, specifically the permits issued under Chapter 30 that deal with navigable waters.

Chapter 30 permits are required whenever someone is intending on doing any kind of work in or near navigable waterways. These permits are most often applicable to homeowners, developers, and businesses. The process that is currently in place has some structure to it, but offers little in the way of predictability and fairness to the applicant. While I think we can all agree that the most important charge of the DNR is to protect our natural resources, I think we can also find some agreement that it doesn't have to be accomplished with an arduous, expensive, and time consuming permitting process. I believe we can accomplish the goal of protecting the environment while at the same time delivering to our citizens a process that puts in place a very understandable structure for the applicants that will take them from the point of application to ultimate determination of the fate of the permit in a timely and predictable manner. That in and of itself will lead to lower costs for homeowners projects and more efficient development that will ultimately lead to lower costs for consumers and businesses alike.

What AB177 attempts to accomplish is exactly that. It sets into statute a process for permitting that will lead to more accountability in the DNR by providing for specific timeframes that the department must adhere to. It also, and I cannot emphasize this enough, does not change any of the environmental standards that we already have in place to protect our waterways. The original draft provides that, if the DNR were to miss a deadline required of it in the statute, the permit would be automatically approved. In the amendment before you, there were a few minor but important revisions that were requested by the DNR and will be incorporated into the bill. First, automatic approval can

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only occur if the department fails to meet timeframes that come after the public hearing process is complete. Secondly, if automatic approval were granted under this bill the department would still have the ability to ensure that standard environmental practices were followed.

The bill also seeks to clarify the burden of proof issues surrounding the contested case hearing process. Under NR 2 the applicant for a permit, after already proving their case to the DNR that they should in fact be issued a permit, can be subject to a challenge at which point the applicant again has the burden of proof. In essence, the applicant has to prove their innocence. Under this bill, the person/entity bringing the contested case would have the burden to prove why the applicant should not be issued the permit. Under the original bill it was also drafted to say that in the case of the DNR denying a permit, the DNR would have the burden of proof if the applicant contested the case. In the amendment that is before you today, that was removed from the bill. It would now simply be that the party bringing the case would have the burden of proof.

As I stated earlier, you also have before you an amendment that we can go over in more detail as well. This amendment was drafted at the request of the DNR and incorporates all of the changes that were requested after their initial review of the bill.

Again, thank you for the opportunity to testify.

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Testimony of the Department of Natural Resources regarding AB 177

Assembly Committee on Housing
June 22, 2011

Thank you to Representative Steineke for the invitation to testify regarding AB 177.

Chapter 30, Wisconsin Statutes contains procedures and standards for regulated activities in navigable waters. Typical regulated activities include dredging material from a lake or streambed; grading or land disturbance along a shoreline; piers, bridges, culverts and other structures, and rock riprap shoreline erosion control. The regulatory framework includes three levels:

- Exemptions – no permit needed, specific conditions and standards must be met
- General Permits – simple and quick permit process with specific conditions and standards
- Individual Permits – longer permit process, more detailed review, public notice and comment period, project-specific conditions must be met

AB 177 relates to the Individual Permit procedures in chapter 30. We have prepared a flow chart which shows the process steps and timelines that will apply under the proposed bill as amended. Based on the bill amendments Representative Steineke has described, here's how the regulatory process will be affected:

- DNR will be able to create additional General Permits without rulemaking, providing more streamlined procedures for projects that meet standard specifications, and reducing the need for Individual Permits
- Individual Permits will have clearly-defined process steps and deadlines for each step
- DNR will have one opportunity to identify all missing information for an Individual Permit application
- Applicants will be expected to provide all missing information before the application can proceed
- Public Notices will be issued by DNR using a web-based system, rather than newspaper publication
- In the rare case where DNR does not meet a decision deadline, DNR will be authorized to impose terms and conditions that are consistent with the applicant's basic project
- When an Individual Permit decision is appealed, the party who files the appeal will have the burden of proof in any resulting hearing

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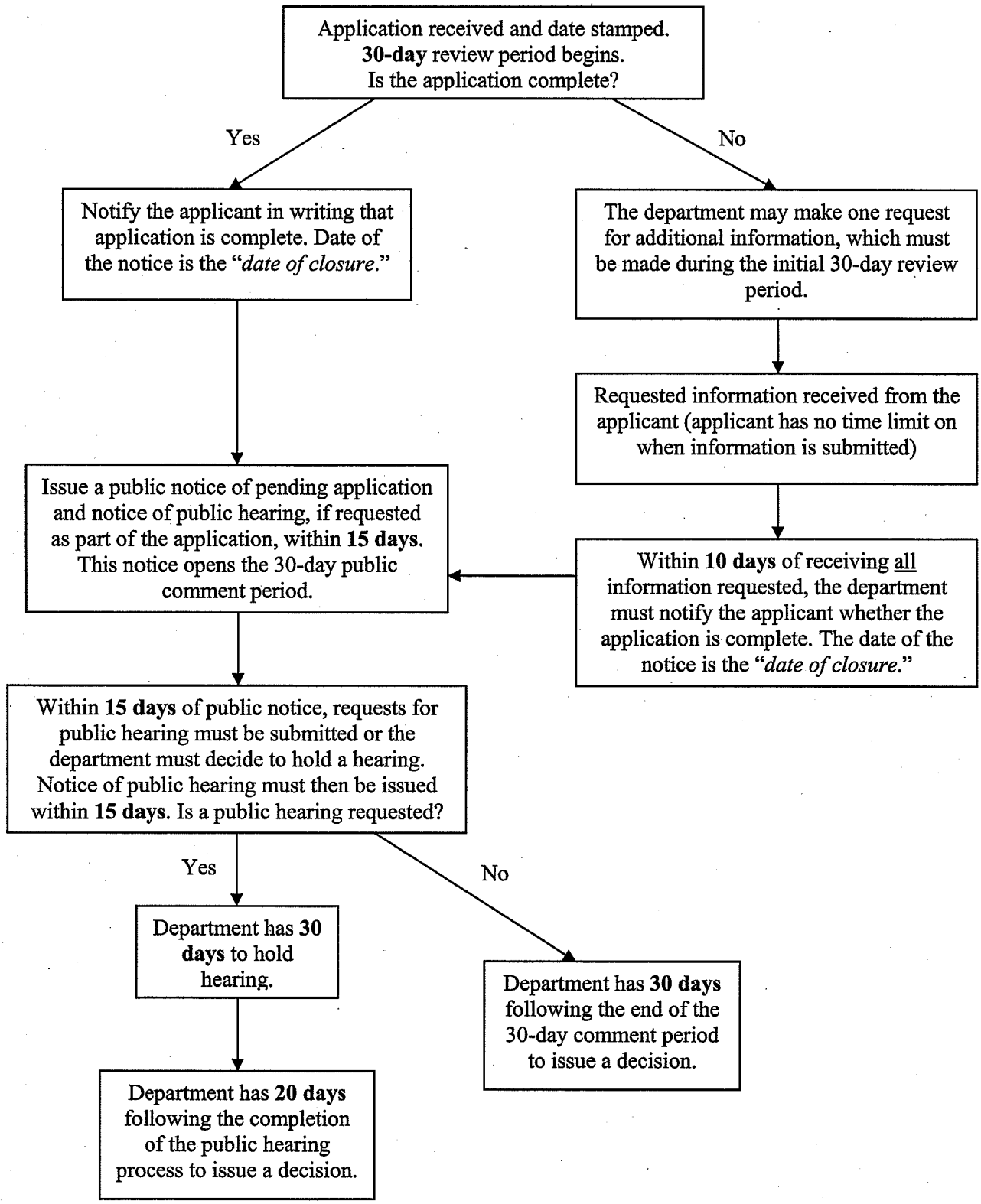
2011 ASSEMBLY BILL 177
INDIVIDUAL PERMIT PROCESS & TIMELINES



RIVER ALLIANCE of Wisconsin

June 22, 2011

Representative John Murtha, Chair, Assembly Committee on Housing
Members of the Assembly Committee on Housing
400 Northeast
State Capitol

RE: AB 177, Permits in Navigable Waters

Dear Representative Murtha and Members of the Assembly Committee on Housing:

The River Alliance of Wisconsin is a non-profit, non-partisan organization representing over 3200 members and supporting over 150 watershed groups around the state. We advocate for the protection and restoration of the state's flowing waters.

We urge you to reject AB 177 which undermines Wisconsin's ability to uphold the Public Trust Doctrine, the long-established law that declares the waters of the state common to all. Based in the state constitution and further defined by case law, all citizens of Wisconsin have the right to boat, fish, hunt, ice skate, swim and enjoy the scenic beauty of the state's waters, as well as the quality and quantity of water that supports those uses.

Wisconsin law recognizes that riparian owners hold rights in the water next to their property, but the Wisconsin Supreme Court has consistently found that when there are conflicts between riparian owners and public rights, public rights are primary, riparian rights secondary. It is the responsibility of DNR to consider how waterway projects, such as piers, bridges, culverts, rip-rapping or grading of shoreline, and dredging or withdrawing water from waterways, would impact public rights in terms of destroying fish habitat, impairing navigation, or causing alterations that forever change the waterbody and impact property values and enjoyment of other riparians. The courts have also ruled that DNR must consider the cumulative impacts of individual projects – whereby a project's impacts could be minor on their own, but could be the tipping point if it is one of many similar projects.

In 2003, the Job Creation Act directed significant streamlining of permit processes for a range of permits, including waterway permits. A three-tiered process with set review deadlines was created, whereby small projects in areas with no known sensitive features are exempt from permits altogether, and a range of projects in areas with limited environmental risk could move forward quickly under a General Permit, in essence a guideline for how to proceed. Those projects that are larger in scale, in areas where there are known sensitive features, or where the property owner chooses not to follow the General Permit guidelines, must apply for an Individual Permit. Individual Permits are

by definition the most complicated projects with the greatest potential to impact public rights; they are the target of AB 177.

While this bill does not seek to revise the environmental standards that Individual Permits must meet, it significantly shortens the already compressed review timeline, both for DNR analysis and for citizen input. As proposed, it would require DNR to move forward even if the applicant has not provided sufficient information, to notify neighbors and the public even if the application is not yet complete, and then allows citizens 10 days to assess, possibly with incomplete information, whether to request a public hearing. Remarkably, the bill also turns on its head the long-standing recognition that an applicant proposing to make a change to a public resource bears the burden of demonstrating they can meet the law. Instead, citizens questioning the permit must prove the proposal could cause damage. Finally, if DNR misses any of the new deadlines, the permit is deemed approved, regardless of the consequences to public rights.

DNR rose to the challenges of the Job Creation Act and created a well-functioning, streamlined waterway permit process. At a time when DNR staffing levels are at an all-time low, significantly foreshortened review times with the looming hammer of automatic approval simply will not permit adequate review and analysis of the site specific and cumulative impacts of complicated projects. Setting unreasonable deadlines and then not providing the resources to meet them is not customer service; nor is raising the bar for citizen input.

AB 177 is unnecessary, punitive to DNR staff, and frankly insulting to the citizens and property owners depending upon the state to uphold their public rights. Please reject AB 177.

Sincerely,

Lori Grant
Water Policy Program Manager

WRA
WISCONSIN REALTORS® ASSOCIATION

John P. Horning, Chairman
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William Malkasian, President
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Memorandum

To: Members, Assembly Housing Committee

From: Tom Larson, Chief Lobbyist and Director of Legal and Public Affairs

Date: June 22, 2011

Re: AB 177 (Permit Processing Deadlines)

The Wisconsin REALTORS® Association supports AB 177, legislation that seeks to add greater certainty and predictability for Wisconsin's homeowners and landowners when applying for permits related to activities near navigable waterways.

The Problem – Chapter 30 of the Wisconsin Statutes regulates various activities important to homeowners and other landowners located near navigable waterways by requiring them to obtain individual permits. Some of these activities relate to new development such as (a) grading permits (for land disturbances of more than 10,000 square feet), (b) dredging related to any navigable waterway (including drainage ditches), and (c) other activities that disturb land in low lying areas or wetlands. In addition, individual permits may be required for common use and property maintenance activities such as placing or grandfathering larger piers, or installing riprap to prevent erosion.

Currently, Chapter 30 contains various deadlines designed to make the permitting process more predictable, equitable and efficient. However, certain deficiencies in the law have prevented this from happening, such as:

- **No limits on completeness determinations**. While Chapter 30 requires the DNR review and application within 30 days after the DNR determines the application to be complete, the law does not establish any timelines for determining completeness. Accordingly, a permit applicant may have to wait several months or longer to receive a determination as to whether the application is complete. Furthermore, in determining whether the application is complete, the DNR can make an unlimited number of requests for additional information from the permit applicant. In addition to causing indefinite delays, the unlimited number of requests for additional information can result in significant costs that may have unknown to permit applicants at the time they submitted the application.

- **No consequences for failing to meet statutory timelines.** Currently, if the DNR fails to meet one of the permit processing deadlines, no consequences exist. As a result, the permit applicant cannot be certain that the permit processing deadlines will be met. Without

appropriate consequences, the permit processing deadlines cannot be enforced and thus are meaningless.

- **The burden of proof in some contested case hearings is misplaced.** Under current law, a member of the public may challenge a decision made by the DNR to grant a permit. When a member of the public challenges such a decision, a hearing is held before an administrative law judge to determine whether the DNR acted properly in granting the permit. However, in cases dealing with wetland permits and other de novo proceedings, the permit applicant has the burden to prove that the DNR acted properly in granting the decision. Given that the permit applicant already presented the necessary information in order for the DNR to grant a favorable decision, placing the burden of proof on the permit applicant a second time to prove that the application is worthy of a favorable decision is a form of double jeopardy and is unfair to the permit applicant.

The Solution – AB 177 seeks to make the permitting process more equitable and predictable for homeowners and landowners by addressing the problems discussed above in the following manner:

- **Allowing the DNR to request additional information from the permit applicant only one time after the application has been submitted**. AB 177 attempts to expedite the permitting process by limiting the number of requests for additional information. This will require the DNR to provide the permit applicant with more specificity regarding what information is necessary to process the permit.

- **Presumptive approval of the permit if the DNR cannot find a reason to deny the permit within the specified timelines.** To ensure greater compliance with the current permit processing deadlines, AB 177 specifies that the permit or contract shall be considered approved if the DNR cannot find a reason to reject the permit or contract within the specified timeframes. Despite claims to the contrary, the bill does not require the DNR to approve the permit application within the specified timeframes, but merely requires the DNR to make a determination.

- **Places the burden of proof on the person who challenges the DNR decision.** AB 177 attempts to make all challenges to DNR decisions consistent by placing the burden of proof on the person who challenges the decision. Currently, the burden of proof is on the person who challenges the decision in all cases EXCEPT wetland permits and de novo proceedings. The bill would make the burden of proof requirement consistent for all DNR decisions.

We urge you to support AB 177. Please feel free to contact us with any questions or comments.

WISCONSIN HOUSING ALLIANCE
THE VOICE OF FACTORY-BUILT HOUSING

June 22, 2011

Assembly Housing Committee

Testimony on AB 177

The Wisconsin Housing Alliance represents the factory built housing industry. We have approximately 500 member companies across the state.

In today's economic environment, construction projects are subject to outside forces that can delay or sidetrack progress and thus end their viability. Financing is one uncertainty. Government regulation is another.

AB 177 is an attempt to remove some of that governmental uncertainty. Unlike the Uniform Building Code which applies to new construction, DNR regulations can affect projects retroactively. DNR rules generally apply to new projects and existing infrastructure. Some DNR rules can be applied retroactively. That is one level of uncertainty – just how do their regulations apply. AB 177 however is aimed at a different type of governmental uncertainty and that is how long will the permitting process take?

AB 177 creates a timetable that is predictable for consideration of DNR permit applications. Developers can accept yes or no answers from the DNR. What is unacceptable is a process that drags along with out a predictable resolution. For that reason, we support AB 177.

Ross Kinzler
Executive Director

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